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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 403

JACK FREDERICK MCKART, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 49–58) is reported at 395 F. 2d 906.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1968. Mr. Justice White extended the time for filing a petition for a writ of certiorari to August 13, 1968. The petition was filed on that date, and was granted on October 28, 1968 (393 U.S. 922). The jurisdiction of this Court is rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's failure to appeal from the determination of his local board regarding his classification, or to appear for a physical examination when ordered to do so, precludes him from asserting, in defense to a criminal prosecution for failure to submit to induction, that he was wrongfully classified I–A in violation of the Selective Service Act.[1]

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of willfully and knowingly failing to report for and submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (A. 40–46). On June 22, 1967, petitioner was sentenced to imprisonment for a period of three years (A. 46–47). The court of appeals affirmed his conviction, one judge dissenting (A. 49–58).

The facts of this case are not in dispute. Petitioner, who was born on February 13, 1943, registered with his local Selective Service board on or about his eighteenth birthday, and shortly thereafter completed and filed his classification questionnaire (A. 7). He was classified I–A by his local board on February 25, 1963, and was so notified on February 26, 1963 (A. 4, 7–8). Petitioner made no attempt to appeal his classification

[1] In our view, only the exhaustion issue, and not the substantive issue relating to the proper construction of Section 6(o) of the Selective Service Act (50 U.S.C. App. 456(o))—establishing the so-called "sole surviving son" exemption which petitioner claims—is properly before the Court at this time (see note 10, *infra*).

(A. 8). On March 23, 1964, he was ordered to report for a pre-induction physical examination on April 21, 1964, but failed to do so (A. 4, 9). On May 1, 1964, he was ordered to report for induction on May 11, 1964 (A. 4, 9), but again failed to report as ordered (A. 10).

Instead, on May 10, 1964, petitioner wrote a letter to his local board stating that he refused to report for induction, and indicating that he did not believe in killing, that the Selective Service System violated his beliefs, and that he therefore refused to have anything to do with it (A. 17–18). The board replied by furnishing petitioner the form for claiming conscientious objector status, suggesting that it should be completed and returned (A. 19). In its letter the board also referred to petitioner's indication, in his original questionnaire, that he was the sole surviving son of a family of which one or more members had been killed in action, and requested further information on that subject (*ibid.*).

On May 20, 1964, petitioner returned the blank conscientious objector form to the board stating that he did "not wish to become classified as a conscientious objector" (A. 20). He reiterated his previous position, saying that he "simply no longer want[ed] to have anything to do with the Selective Service System" (*ibid.*). At the conclusion of this letter he stated (A. 23–24):

> If I indicated that I was a "Sole Surviving Son" when I filled out your forms around my 18th birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the second world war. I

do not have the specific information you ask for.

On June 24, 1964, the local board, by letter, once again requested information from petitioner concerning the details surrounding the death of his father during World War II (A. 24). Petitioner responded by supplying some information in this regard (A. 24–25). Subsequently the board, acting on its own initiative, cancelled his induction order and classified him IV–A (A. 11, 26)—the appropriate classification for one exempted as a "sole surviving son" pursuant to Section 6(o) of the Selective Service Act (50 U.S.C. App. 456(o)). From July 27, 1964, until February 14, 1966, petitioner remained in the IV–A classification.

Early in 1966, the local board learned of the death of petitioner's mother. After having been advised by National Headquarters, through the State Director, that petitioner no longer qualified for a "sole surviving son" exemption (A. 64–66), his classification was changed from IV–A to I–A (A. 12). Petitioner took no steps to appeal this reclassification. He was ordered to report for a physical examination on March 17, 1966, and for induction on April 21, 1966 (A. 13–14, 28, 29). He failed to comply with either of these orders (A. 13–14), having asserted in a letter of April 20, 1966, that "[a]ll I want is to be left alone to live my life as I see fit" (A. 32). His criminal prosecution for violation of 50 U.S.C. App. 462 resulted.

At the trial, petitioner's uncle testified that both of petitioner's maternal grandparents and his paternal grandmother were still alive (A. 15–16). Petitioner,

because of his refusal to have anything to do with the Selective Service System, had not brought these facts to the attention of his local board (see A. 17–18, 20–24, 32).

SUMMARY OF ARGUMENT

Almost 25 years ago this Court established, in *Falbo* v. *United States,* 320 U.S. 549, and *Estep* v. *United States,* 327 U.S. 114, that a Selective Service registrant is required to exhaust his administrative remedies or else he is precluded from maintaining that he was misclassified by his local board in defense to a criminal prosecution for failure to submit to induction. Both this Court and the courts of appeals have repeatedly recognized the continuing vitality of the exhaustion requirement in the Selective Service context. As recently as *Oestereich* v. *Selective Service Board,* No. 46, this Term, decided December 16, 1968, the Court explicitly referred to the exhaustion doctrine of *Falbo* and *Estep* with apparent approval.

That doctrine is a long settled one in administrative law generally, and is grounded on sound policy considerations both philosophical and pragmatic in character. It has particular applicability in the Selective Service context, where both Congress and the President have established an elaborate review machinery for considering claims of misclassification of registrants by local boards. If registrants are allowed to bypass these appellate processes with impunity, a substantial increase in litigation regarding Selective Service classifications might result and the primary function of the System, *i.e.*, the rapid mobilization of manpower during

a national emergency, could be thwarted. The exhaustion doctrine of *Falbo* and *Estep* is in any event not unique to the Selective Service context. This Court has long recognized that the failure to pursue an administrative remedy may preclude a defendant from asserting certain defenses in a subsequent criminal prosecution arising out of the same matter. *E.g., Yakus* v. *United States,* 321 U.S. 414, 431–448.

Petitioner's contention that the exhaustion requirement is inapplicable to the particular facts of the instant case is unpersuasive. It seems clear that the taking of administrative appeals would not have been a futile formality here, since the proper construction of Section 6(o) of the Selective Service Act, which provides for the sole surviving son exemption that petitioner claims, is concededly a question of first impression on which the National Selective Service Appeal Board might well have disagreed with the position of the Director. Moreover, the question involved is not solely one of law or statutory interpretation. Since the purpose of the exemption claimed is subject to a variety of possible interpretations, there could well have been issues of fact which might, upon administrative review, have been found determinative. In any event, if the issue is viewed solely as one of law, it is the kind of legal question which the appropriate administrative agency should be given an opportunity to pass upon in the first instance.

Petitioner is also precluded from attacking his reclassification from IV–A to I–A upon the death of his mother because his failure to compete the ad-

ministrative processing for induction by refusing to comply with two separate orders to report for pre-induction physical examinations. That requirement, while closely related to the exhaustion doctrine, is a distinct principle grounded on somewhat different considerations. Under this Court's decision in *Falbo*, petitioner was required to complete the administrative processing by taking the ordered physicals, which might well have resulted in his rejection for service. No registrant, whatever his classification, is entitled to ignore an order to report for a pre-induction physical, and petitioner could have been prosecuted for this violation without regard to the propriety of his reclassification. His refusal to report for a physical examination when ordered to do so thus provides a separate and sufficient ground for barring his assertion of a defense of misclassification in the instant criminal case.

ARGUMENT

PETITIONER'S DISREGARD OF ESTABLISHED ADMINISTRATIVE PROCESSES PRECLUDED HIM FROM ASSERTING A CLAIM OF MISCLASSIFICATION AS A DEFENSE TO HIS CRIMINAL PROSECUTION FOR VIOLATION OF THE SELECTIVE SERVICE ACT

Petitioner's failure to pursue and exhaust his administrative remedies in the instant case was not, as the facts plainly show (see *supra*, pp. 2–4), the result of inadvertence, ignorance or mistake. Rather, the issue presented here is whether a Selective Service registrant who deliberately and flagrantly refused to appeal the classification given him by his local board through the review processes established by

Congress and the President within the Selective Service System, and who failed to appear for a physical examination prior to induction when ordered to do so, may nonetheless assert the defense of misclassification in a subsequent criminal prosecution for refusing to submit to induction. As the district court found and petitioner concedes, not only did he intentionally refuse to exhaust his administrative remedies; he simply refused to have anything to do with the Selective Service System at all (see A. 42). Under these circumstances, to permit petitioner to attack his classification when prosecuted for willful failure to obey his board's order to report for induction would be to minimize to the point of ineffectiveness the elaborate appellate machinery existing within the Selective Service System and established by both the President and Congress.[2]

[2] The pertinent provisions of the statute and the regulations which establish this administrative review machinery include, *inter alia*, Sections 10(b)(2) and 10(b)(3) of the Selective Service Act (50 U.S.C. App. 460(b)(2) and (3)), as amended, which contain general provisions relating to State Directors, State Appeal Boards, and review by the President or his delegate (see 50 U.S.C. App. 460(c)), and a number of sections of the Selective Service System regulations, including 32 C.F.R. 1604.6 (creating and prescribing the duties of the National Selective Service Appeal Board), 32 C.F.R. 1604.21 *et seq.* (relating to the organization and composition of State Appeal Boards), 32 C.F.R. 1604.71 (providing for the appointment and prescribing the duties of government appeal agents), 32 C.F.R. 1624.1 *et seq.* (relating to a registrant's appearance before his local board), 32 C.F.R. 1625.1 *et seq.* (providing for the reopening and reconsideration of a registrant's classification by his local board), and, most particularly, 32 C.F.R. 1626.1 *et seq.*, 1627.1 *et seq.*, and 1628.1 *et seq.*, which elaborately provide, respectively, for appeals to State Appeal Boards, appeals to the President (whose authority is exercised by the National Appeal Board), and physical examinations of registrants prior

If petitioner were to prevail here, other registrants would be encouraged to bypass these administrative processes and the result would be a predictable increase in the volume of such litigation and a potentially serious impairment of the primary function of the Selective Service System, *i.e.*, the rapid mobilization of manpower in times of national emergency. There are 4,085 local draft boards and nearly 20,000,000 men who are within the current age limits of liability for training and service in the Armed Forces of the United States. *Semi-Annual Report of the Director of Selective Service for the Period July 1 to December 31, 1967*, p. 5. As the Third Circuit, sitting *en banc*, said in *United States* v. *Palmer*, 223 F. 2d 893, 896, certiorari denied, 350 U.S. 873:

> * * * [A] sympathetic Congress, desirous to afford a maximum of freedom of conscience, has provided for complete exemption from service for some people and partial exemption for others. It has also provided for a rather elaborate machinery for appeal to make sure that mistakes of local boards do not result in a failure to give any registrant what is due him under the law. There is a method prescribed for handling all these claims for exemption in an orderly way. If rules must be laid down for

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to being ordered to report for induction, and the whole panoply of procedures relating to these matters.

It should be noted that the standard Notice of Classification (SSS Form 110) provided to all registrants upon their classification or reclassification (see 32 C.F.R. § 1623.4) contains a detailed explanation of the registrant's right to take an administrative appeal (see A. 62–63), including information regarding both the timing and manner of appealing a classification to both the State and National Appeal Boards. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 37[illegible]

> the handling of court business, as they are, and the proceedings of administrative bodies, as they are, there is even greater reason for the establishment of orderly procedure with nearly four thousand volunteer boards handling the cases of more than fifteen million young men.

Petitioner, who elected to ignore this carefully constructed system altogether, is in no position to assert, in defense of his deliberate refusal to comply with the orders of his local board, that the board erred in classifying him. The instant case is unlike either *Wolff* v. *Selective Service Board, No. 16,* 372 F. 2d 817 (C.A. 2) or *Oestereich* v. *Selective Service Board,* No. 46, this Term, decided December 16, 1968, where individuals who claimed that their local boards had improperly reclassified them because of activities in which they had engaged sought the aid of the courts, long before the stage of criminal prosecution was reached. Here petitioner did nothing. He did not even notify his local board that he regarded his classification as incorrect. He took no steps to have any claimed error corrected on administrative appeal. He did not, as did the registrants in *Wolff* or *Oestereich,* attempt to preclude the possibility of criminal prosecution by seeking a pre-induction determination of the validity of his classification from the courts. He made no affirmative attempt of any kind to obtain the classification to which he now says he was entitled from the Selective Service System. He simply sought to assert, in defense to the criminal prosecution which ultimately ensued, a claim that the board, whose orders he ignored, should not have classified him as it did. His own prolonged and purposeful inaction, we sub-

mit, was properly held to preclude him from making such a contention at such a late stage.[3]

A. PETITIONER'S FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES PREVENTED HIM FROM CLAIMING THAT HE WAS IMPROPERLY CLASSIFIED

1. In *Estep* v. *United States*, 327 U.S. 114, 123, this Court held that a Selective Service registrant must have "pursued [his] administrative remedies to the end" before he can assert the defense of misclassification in a criminal prosecution for refusing to submit to induction into the Armed Forces.[4] That holding

[3] It is interesting to note that a recent law review comment which proposes statutory expansion of the right to judicial review of Selective Service classifications would not extend the right of judicial review of a classification to a registrant who deliberately or wantonly ignores possible remedies within the system. Note, *Judicial Review of Selective Service Action: A Need for Reform*, 56 Calif. L. Rev. 448, 463 (1968). That article states: "When the United States Attorney prosecutes a registrant for refusing to submit to induction, the registrant should be permitted to assert the defense of misclassification or unfairness unless he has deliberately or wantonly failed to exhaust his administrative remedies. Because the registrant faces a possible jail sentence, the courts should review the Selective Service action for reversible error to ensure that the registrant is not unjustly convicted of a federal crime. This would not confound any policies underlying the exhaustion doctrine because the courts would not review a classification when the registrant has deliberately or wantonly ignored possible remedies within the system."

[4] *Estep* further held that the statutory prescription that decisions of Selective Service boards "shall be final" at each administrative level was not intended wholly to prohibit post-induction judicial review of Selective Service classifications, but simply to reflect a congressional intent to give administrative action in the Selective Service context a more limited scope of review than ordinarily obtains (327 U.S. at 122). See 4 Davis, *Administrative Law Treatise*, Sec. 28.12 (1958). Under that view, a classification could be invalidated, when challenged in

confirmed and applied the Court's earlier decision in *Falbo* v. *United States*, 320 U.S. 549, where the assertion of such a defense was disallowed because of the registrant's failure to take all of the steps prescribed in the administrative processes. Since the decision in *Estep*, the courts of appeals have uniformly held that, except in extremely rare cases involving exceptional circumstances,* the disregard of administrative appellate processes prevents a defendant from challenging his classification in the courts. See, *e.g.*—among the more recent decisions—*Dunn* v. *United States*, 383 F. 2d 357 (C.A. 1), certiorari denied, 390 U.S. 982; *Kidd* v. *United States*, 386 F. 2d 422 (C.A. 10); *Noland* v. *United States*, 380 F. 2d 1016 (C.A. 10), certiorari denied, 389 U.S. 945; *Edwards* v. *Unit-*

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defense to a criminal prosecution, only where "no basis in fact" therefore existed (327 U.S. at 122–123). In Section 10(b)(3) of the Act, as amended in 1967, this standard for post-induction judicial review is, it should be noted, explicitly prescribed (50 U.S.C. App. 460(b)(3)).

* For example, in *Donato* v. *United States*, 302 F. 2d 469, 470 (C.A. 9), certiorari denied, 374 U.S. 828, the defendant had been summoned to firefighting duty during the time specified for an appeal from the classification decision and the appeal period had expired when he returned from the firefighting mission. Petitioner relies in his brief (pp. 9, 13) on *Glover* v. *United States*, 286 F. 2d 84 (C.A. 8) and *Wills* v. *United States*, 384 F. 2d 943 (C.A. 9), certiorari denied, 392 U.S. 908. In *Glover*, however, the appellant had taken an administrative appeal from a prior classification notice and lost, but failed to appeal from his fifth and final notice of classification. The court excused this "procedural irregularity." In *Wills* the court of appeals found that the local board did not mail the registrant his notice of delinquency until long after the expiration of the period for appeal from his reclassification. The court found that this error by the local board excused petitioner's failure to exhaust administrative remedies. None of these unusual circumstances is present here. Accordingly, both cases are distinguishable and neither case supports petitioner.

ed States, 395 F. 2d 453 (C.A. 9), certiorari denied, 393 U.S. 845; *United States* v. *Kurki*, 384 F. 2d 905, 907 (C.A. 7), certiorari denied, 390 U.S. 926.

Decisions of this Court as well have repeatedly given explicit recognition to the continuing vitality of the exhaustion requirement as established in *Falbo* and *Estep*. See, *e.g.*, *Billings* v. *Truesdell*, 321 U.S. 542, 558; *Gibson* v. *United States*, 329 U.S. 338, 349–350; *Sunal* v. *Large*, 332 U.S. 174, 176; *Cox* v. *United States*, 332 U.S. 442, 445, 448; *Witmer* v. *United States*, 348 U.S. 375, 377. Indeed, this Court's recent opinion in *Oestereich* v. *Selective Service Board*, No. 46, this Term, decided December 16, 1968, makes specific reference to the holding in *Falbo* that "a registrant could not challenge his classification without first exhausting his administrative remedies by reporting, and being accepted, for induction" (slip op., p. 3, n. 5), and to the fact that the registrants involved in *Estep*—where alleged misclassification was allowed to be asserted in defense to a criminal prosecution—"had exhausted their administrative remedies by reporting, and being accepted, for service, before then refusing to submit to induction" (*ibid.*).[6] Similarly, in *Clark*

[6] *Oestereich* of course involved pre-induction judicial review of an allegedly unlawful reclassification of an individual entitled to an express statutory exemption. Where pre-induction suits are permissible, consistent with amended Section 10(b)(3) of the Act, as in the *Oestereich* situation, it is obvious that the exhaustion requirement can only be applied, as a practical matter, to *available* remedies, and thus in a somewhat different manner than in *Falbo* and *Estep*—and the instant case—all of which involved criminal prosecutions after refusals to submit to induction. It is significant, however, that the Court in *Oestereich* expressly noted that the registrant there "took an administrative appeal and lost" (slip op., p. 2). In this regard, see also

v. *Gabriel*, No. 572, this Term, decided December 16, 1968, both *Falbo* and *Estep* were cited by the Court with apparent approval (slip op., p. 3).[7]

The requirement that an individual must exhaust his administrative remedies before requesting the judiciary to set aside an administrative determination which he thinks erroneous is, of course, a "long settled rule" of administrative law. See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–52; *Lichter* v. *United States*, 334 U.S. 742, 791–792; Jaffe, *Judicial Control of Administrative Action*, pp. 424–426, 450–454 (1965).[8] The underlying considerations range from the philosophical to the pragmatic. The philosophical argument for this rule has been succinctly stated by Professor Jaffe as follows (*id.* at 425):

> Under the Anglo-American conception, administrative agencies are distinct entities; they are not a part of the judicial system. Judicial control comes in from the outside. The agency

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Mr. Justice Harlan's concurring opinion (slip op., p. 7, n. 7), which stated that "a registrant making such a claim [of a statute's or regulation's invalidity] may [not] come into court before he has exhausted his administrative appeals, for the System may decide in his favor on other grounds, obviating the need for further review," but pointed out that "[p]etitioner here has exhausted available remedies" (*ibid.*).

[7] In *Gabriel* the registrant was denied pre-induction review of his classification, despite his exhaustion of available administrative remedies, because of the application of Section 10(b)(3) of the Act.

[8] Indeed, in *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U.S. 209, the Court referred to the exhaustion requirement declared in the *Myers* case as an "abiding and fundamental principle" of our jurisprudence (*id.* at 222). Cf. 3 Davis, *Administrative Law Treatise*, Sec. 20.01 *et seq.* (1958).

> is either within the Executive or, under *Humphrey's Executor*, "independent." The Judiciary will not lightly interfere with a job given to the Executive until it is clear that the Executive has exceeded its mandate. The exhaustion doctrine is, therefore, an expression of executive and administrative autonomy. * * *

The primary pragmatic consideration underlying the exhaustion doctrine is that of decreasing the volume of litigation in the courts by allowing administrative agencies to correct their errors through their own internal review processes. Cf. *United States* v. *Ruzicka*, 329 U.S. 287, 292–293; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767. If exhaustion were not required, the federal district courts might well come to replace the Selective Service appeal boards as those bodies primarily responsible for reviewing local draft board decisions. The unnecessary increase in the burden on the courts which could result is suggested by a consideration of the statistics relating to the volume of administrative appeals within the System itself. In fiscal year 1965, there were 9,741 such appeals; in fiscal 1966, 49,718 appeals; and in fiscal 1967, 119,167.* There was a similar proportional increase in the number of appeals from

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*The Selective Service System does not keep statistics on a national basis with respect to how many registrants are successful in having their classifications changed on appeal. However, the System has informed us that in fiscal year 1968 in the District of Columbia there were 270 administrative appeals and decisions favoring the registrant were rendered in 150 of these cases. Thus, 56 percent of the appeals taken resulted in the registrant's succeeding in obtaining a reclassification from the appeal board.

decisions of the various appeal boards to the National Appeal Board which acts on behalf of the President. In fiscal year 1965, there were only 163 such appeals; in fiscal 1966, 795, and in fiscal 1967, 2,175. *Semi-Annual Report of the Director of Selective Service for the Period July 1 to December 31, 1967*, p. 10.

Congress and the President have established this elaborate review machinery for the purpose of ensuring, insofar as possible, that errors in classification are corrected internally within the System, without any occasion for recourse to the courts. If all the points which might be raised in the course of the review processes remain available for a registrant to assert in defense to a criminal prosecution for violation of the Act, regardless of whether he pursues these processes, there is little incentive for a registrant to exhaust his administrative remedies. The more cautious, to be sure, would continue to test their claims administratively without risking criminal sanctions. But, predictably, many would simply sit back, as did petitioner here, and do nothing about challenging their classification until a prosecution was brought. Then, without the gloss of administrative review—which in many cases results in an overturning of the decision reviewed (see *infra*, pp. 23–24)—they would seek to obtain review, *ab initio*, by a court. If every registrant who thought he was misclassified by his local board could arbitrarily decide to ignore the appellate processes provided him within the Selective Service System and wait to assert the alleged misclassification in defense to a criminal prosecution, a substantial increase in the volume of such litigation in the federal courts might well ensue.

Moreover, if the established administrative review machinery can be bypassed with impunity, the primary function of the Selective Service System, *i.e.*, the rapid mobilization of manpower in times of national emergency, could be thwarted. An individual who has been classified I–A solely by his local draft board would be more likely to resist an order to report for induction and take a chance on asserting the defense of misclassification in his criminal prosecution, if that avenue is open to him, than a registrant who knows that his claim of misclassification has already been rejected by both his local board and either one or two appeal boards. There is no reason to adopt a rule that would encourage such defiance of the System.

In any event, the exhaustion doctrine of *Falbo* and *Estep* is not peculiar to the Selective Service context. This Court has long recognized that the failure to seek an administrative remedy may preclude a defendant from asserting certain defenses in a criminal case arising out of the same matter, even though administrative relief is no longer available. Thus, in *Yakus* v. *United States*, 321 U.S. 414, the defendants who were prosecuted for violating price regulations under the Emergency Price Control Act attempted to raise as a defense the invalidity of the price regulation which they were accused of violating, although the time for an administrative attack on the regulation had passed when the criminal case was brought and there had been no resort to the prescribed administrative review procedure. This Court held that the proposed defense

was properly rejected by the trial court, stating (321 U.S. at 444):

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

Just as in *Yakus*, in the Selective Service context it has been "thought desirable to preface all judicial action by resort to expert administrative knowledge and experience, and thus minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation" (321 U.S. at 433). Indeed, the Court in *Yakus* placed specific reliance on its then-recent holding regarding exhaustion in *Falbo* (see 321 U.S. at 446).

Nor are *Yakus* and *Falbo* in any respect unique in requiring exhaustion of administrative remedies to preserve defenses to criminal prosecutions. As the Court in *Yakus* itself pointed out (321 U.S. at 445):

> For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates * * * even though the validity of these rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. * * * It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful * * *

To be sure, in many situations the validity or applicability of a statutory command can only be tested by disobeying and risking criminal sanctions. And of course, where there are no administrative remedies available at any stage, there is no exhaustion requirement which must be satisfied before the validity of such statutory provisions can be challenged in defense to a criminal prosecution. But, where, as here, there are readily available administrative appeals which might be taken, it is not unconscionable to require, as the Court did in *Yakus*, that they be pursued in order to preserve the ability to attack the validity of the underlying provisions judicially in defense to a later criminal prosecution. Certainly, there can be no hesitation to apply that rule to a defendant who was fully aware of the existence of the administrative review machinery but simply chose to ignore—and ultimately sought to bypass—it.

2. Petitioner maintains, however, that application of the doctrine of exhaustion of administrative remedies is inappropriate in the instant case because (1) the issue involved was solely one of law or statutory interpretation, and (2) it would in any event have been a futile formality for him to have appealed his classification within the Selective Service System (Pet. 8–15).

In the latter regard, petitioner points to a letter concerning his classification from the National Headquarters to the State Director in which the opinion is expressed that "[i]nasmuch as there is no family, it is not believed that he qualified for sole surviving son status" (Pet. 8; see A. 65). Parenthetically, it should be noted that petitioner was completely un-

aware of this correspondence at the time he failed to appeal his reclassification as I-A. His willful failure to appeal was based on his refusal to have anything to do with the Selective Service System, and not in any respect because he had reason to believe that an administrative appeal would necessarily be an empty gesture. Beyond this, however, in view of the fact that petitioner concedes that the proper construction of the statutory exemption for sole surviving sons contained in Section 6(o) of the Act (50 U.S.C. App. 456(o)) is a question of first impression (see Pet. 15), his taking of an administrative appeal can hardly be characterized as a futile formality.

The substantive issue which petitioner might have presented in the course of an administrative appeal is in any event not wholly or necessarily one of law. The intended thrust of the sole surviving son exemption is subject to different possible interpretations.[10]

[10] We do not discuss the substantive issue raised by petitioner relating to the proper interpretation of the sole surviving son exemption contained in Section 6(o) of the Act. We recognize that this was one of the stated questions presented in the petition for certiorari, that the Court did not limit its grant to the exhaustion issue, and that petitioner briefs the issue at some length (Pet. Br. 16-20). However, that issue was not reached by either of the courts below, since the district court refused to consider the claim of exemption (see A. 45) and the court of appeals affirmed the judgment of conviction without reaching the exemption question (A. 56-57), both on the ground that petitioner's failure to pursue and exhaust his administrative remedies precluded his assertion of such a claim in defense to his criminal prosecution. In view of this fact, it would seem inappropriate for this Court to reach and resolve that issue, even should it disagree with our position on the exhaustion issue.

The question of how Section 6(o) should be interpreted is a close and difficult one, as to which the rather sparse legis-

If the basic purpose is deemed to be the preservation of a particular lineage, then the fact that petitioner is the last of his father's line would justify the granting of the exemption. If, however, the essential purpose is regarded as sparing the "family" any further grief or permitting the continued presence of the last male member of the "family" to console, comfort and support the remaining members thereof, there could be issues of fact as to what constitutes the "family" within the contemplation of Section 6(o). For instance, at petitioner's trial it was brought out that both of petitioner's maternal grandparents and petitioner's paternal grandmother were still alive, although petitioner never called these facts to the attention of his local draft board. Even at the present

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lative history is singularly unrevealing regarding the congressional intent in situations like petitioner's. Indeed, a consideration of the statutory language, first adopted in 1948 and amended in 1964, and the pertinent legislative history, shows that Congress may have had a variety of purposes in mind, some of which favor petitioner's reading of the section and some of which support the System's interpretation. Moreover, the exhaustion issue is presumably the recurring question of importance which prompted the court to grant review here. This seems confirmed by the granting of certiorari in *DuVernay* v. *United States*, No. 814, this Term (docketed as No. 442 Misc.) on December 9, 1968, in an order specifying that oral argument in that case shall immediately follow that in the instant case. *DuVernay* similarly involves, *inter alia*, the question whether the failure to exhaust administrative remedies precludes the assertion of misclassification as a defense to a criminal prosecution for violation of the Selective Service Act, albeit in a somewhat different context. In light of these considerations, it is our submission that, should the Court conclude that the exhaustion doctrine was improperly applied here, the case should be remanded in order to afford the lower courts an opportunity to consider and decide the statutory construction question.

time we do not know whether petitioner's paternal grandmother had any children other than the son, petitioner's father, whom she lost in World War II. The facts, if known, might have influenced the initial determination of the local board and the decisions of the appeal boards had administrative review been sought.

Even if the construction of the sole surviving son exemption be viewed solely as an issue of law, it is in any event the kind of legal question which the agency charged by Congress with the duty of executing the statute should pass upon in the first instance. Cf. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207–208; *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 235–237; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131. Here the situation is unlike that in *Wolff* v. *Selective Service Board No. 16*, 372 F.2d 817, 825 (C.A. 2), where agency policy had been firmly fixed and publicly announced.[11] Nor is it like that in *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562, or *Leedom* v. *Kyne*, 358 U.S. 184, 188, on which petitioner relies to support his contention that where an administrative agency allegedly misconstrues a statute, the exhaustion doctrine is inapplicable. In both of those cases the claims were that the administrative agencies had acted beyond their statutory jurisdiction. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 479–481, in which the Court distin-

[11] The official Selective Service System regulation (32 C.F.R. 1622.40(a)(10)) governing the placing of a sole surviving son in Class IV–A does not shed any light on the scope of the statutory exemption.

guished *Leedom* v. *Kyne*, and stated that the exception created by that case is a narrow one which is not to be extended. Here petitioner was clearly subject to the jurisdiction of the Selective Service System since he was a registrant of the age group which is liable to be called for training and service in the Armed Forces. The informal opinion expressed in a letter from National Headquarters is not necessarily binding on the State Appeal Board, for the State Appeal Board has a duty to consider matters of classification *de novo*. See 32 C.F.R. 1626.26(a); see also *Falbo* v. *United States*, 320 U.S. 549, 555 (concurring opinion of Mr. Justice Rutledge); *DeRemer* v. *United States*, 340 F. 2d 712, 719 (C.A. 8).

Moreover, if petitioner had appealed his reclassification, his appeal might have reached the National Selective Service Appeal Board, which is appointed by the President and which exercises the power bestowed upon the Chief Executive by 50 U.S.C. App. 460(b)(3),[12] independent of the Director of Selective Service (see 32 C.F.R. 1604.6(b)). This independence of the

[12] Section 10(c) of the Act (50 U.S.C. App. 460(c)) authorizes the delegation of this review authority by the President, and it is pursuant thereto that the National Appeal Board was established (see 32 C.F.R. 1604.6). It should be noted that an appeal from the State Appeal Board may be taken to the National Appeal Board by the registrant himself where one or more members dissented from the former body's determination as to his classification (32 C.F.R. 1627.3). Where the State Appeal Board is not divided, an appeal to the National Appeal Board may be taken by either the National Director or the State Director when either "deems it to be in the national interest or necessary to avoid an injustice" (32 C.F.R. 1627.1(a)), and such an appeal may be taken at any time (*ibid.*). An appeal to either the State or National Appeal Board, it should be noted, stays the registrant's induction (32 C.F.R. 1626.41, 1627.8).

National Appeal Board from the rest of the System is not only theoretical. The statistics demonstrate that the Board in fact acts independently of the rest of the System. Thus, in the first half of 1968, the National Selective Service Appeal Board adjudicated 1,129 appeals. During this period, 479 appeals were taken by registrants and the Board reversed the determination of the State Appeal Boards 147 times. Of 361 appeals taken by the National Director, the Board affirmed the determination of the State Appeal Boards in 219 of these cases; of 289 appeals taken by State Directors, the Board affirmed the determination of the State Appeal Boards in 146 of these cases.

Thus, in more than half of the cases in which either the National Director or a State Director of Selective Service thought that a State Appeal Board had made an erroneous classification, the National Selective Service Appeal Board, exercising its independent judgment, affirmed the determinations of the State Appeal Board. *Statistical Report for the National Selective Service Appeal Board for the Six-month Period—January 1, 1968, to June 30, 1968.*[13] In view of these statistics, it simply cannot be said that petitioner's pursuance of his administrative appeals would have been demonstrably futile. Thus, contrary to petitioner's contention, nothing in the facts of the instant case take it out of the ordinary rule that the failure to exhaust administrative remedies bars a claim of misclassification as a defense to a criminal prosecution for willful failure to report for induction.[14]

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[13] A copy of the pertinent part of the statistical report is included in the Appendix (*infra*, p. 31).

[14] In our view, the Court's holding in *Oestereich* v. *Selective Service Board*, No. 46, this Term, decided December 16, 1968,

B. PETITIONER'S FAILURE TO COMPLETE THE ADMINISTRATIVE PROCESSING BY NOT REPORTING FOR A PRE-INDUCTION PHYSICAL EXAMINATION SIMILARLY PRECLUDED HIM FROM ASSERTING THE DEFENSE OF MISCLASSIFICATION

Petitioner is also precluded from attacking his reclassification in this criminal case because of his failure to complete the administrative processing for induction. Petitioner simply ignored two separate orders to report for a pre-induction physical examination. He also failed to report to the induction center when ordered to do so, at which time he would have received a physical examination prior to being told, if found physically fit, to step forward, the symbolic act which signifies acceptance of induction.

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does not support petitioner's claim that the exhaustion requirement was inapposite here. In *Oestereich* the Court held that a registrant incontestably entitled to a statutory exemption, who is reclassified as a result of alleged engagement in protest activity, can obtain pre-induction judicial review of the validity of his reclassification in a civil action for injunctive relief, despite the general prohibition on such suits contained in amended Section 10(b)(3) of the Act. Had petitioner sought pre-induction review (after having exhausted his administrative appeals, as did Oestereich; see note 6, *supra*), he might well have been held entitled to bring such a suit. Like Oestereich, he claimed an absolute statutory exemption from military training and service, and not simply a deferment conditioned on the survival of a member of his "family", although, unlike *Oestereich*, his claim was not "plain and unequivocal and in no way contested" (slip op., p. 5) (see note 10, *supra*). Compare *Clark* v. *Gabriel*, No. 572, this Term, decided December 16, 1968, and *Boyd* v. *Clark*, No. 490, this Term, decided January 13, 1969. Nonetheless, the fact that petitioner claimed an exemption in no respect relieved him of the obligation to exhaust his available administrative remedies. At whatever stage the courts might properly [illegible] a claim such as that made by petitioner, it can only be [illegible] other available, non-judicial remedies have been pursued.

At the outset it should be noted that the doctrine that a Selective Service registrant must complete his administrative processing in order to be able to assert a defense of misclassification, while closely related to the doctrine of exhaustion of administrative remedies, is a separate and distinct principle based on different pragmatic considerations. That settled doctrine is applicable here, and provides an additional and alternative ground for upholding the judgment below (see A. 53–55).

In *Falbo* v. *United States,* 320 U.S. 549, 553, this Court noted that a registrant may have exhausted his administrative appeals and still be rejected for service as a result of the physical examination which is given at the induction center prior to actual induction. Consequently, this Court held that a registrant who failed to report for such a physical examination had not completed the administrative process and could not assert the defense of misclassification in a prosecution for failing to report for induction.[15] The Court reaffirmed this rule in *Gibson* v. *United States,* 329 U.S. 338, 343–345, which was decided after *Estep,* the decision which clarified *Falbo* (see *supra,* pp. 11–12). The rationale underlying the *Falbo* doctrine has been ex-

[15] Subsequent to *Falbo* the regulations were changed so as to provide, as a general matter, for the giving of pre-induction physicals "before issuance of the order to report for induction, rather than afterward" (*Gibson* v. *United States*, 329 U.S. 338, 347). That basic approach as to the timing of physicals is still utilized (see 32 C.F.R. 1628.10), although a determination is still made at induction center as to whether each registrant is qualified for induction (see 32 C.F.R. 1632.15(e), 1632.16).

plained as follows (*Daniels* v. *United States*, 372 F. 2d 407, 414 (C.A. 9 (*en banc*)):

> * * * [E]ven after administrative remedies have been exhausted, a court will not examine the validity of a classification until the registrant establishes that he has been aggrieved. A registrant is aggrieved only when the selection process is at an end and there is no longer a possibility of rejection as a part of that process. * * *

That rationale is no less pertinent today than it was when *Falbo* was decided.

The chances that petitioner might have been rejected for service in the Armed Forces after a pre-induction physical or after examination at the induction center were hardly remote or insignificant. During the six-month period beginning July 1, 1967, and ending December 31, 1967, according to the Selective Service System, pre-induction physical examinations were given to 435,025 registrants. Of these, 178,718, or 41.1 percent, were found not to be physically qualified for service. During the same period, the local boards delivered 159,772 registrants to induction centers where, after examination or inspection, 24,574, or 15.4 percent, were found not to be qualified for service. *Semi-Annual Report of the Director of Selective Service, supra,* at p. 12. Thus, as the court of appeals stated in *United States* v. *Irons*, 369 F. 2d 557, 558 (C.A. 6):

> Even if improperly classified I–A, there remains the possibility, unfortunately all too great in these times, that he will fail the physical examination and be reclassified as 4–F.

> Where that is the result, all constitutional and other problems incident to I-A classification disappear of course, *eo instanti*.[16]

Moreover, the fact that 15 percent of registrants ordered to report for induction are rejected at the induction center shows that the *Falbo* doctrine has continuing pragmatic validity. It is particularly applicable in a case like this one where petitioner completely ignored all orders of the board, and had not been given a physical examination previously.[17]

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[16] See also *United States* v. *Balogh*, 329 U.S. 692, where this Court, on the authority of *Falbo*, reversed a decision of the court of appeals (157 F. 2d 939) which had held a local board's classification and order to report for induction invalid. On remand the court of appeals sustained the conviction (160 F. 2d 999 (C.A. 2)), and certiorari was denied (331 U.S. 837).

In a recent decision, a panel of the court of appeals for the Ninth Circuit noted the distinction between the completion of administrative processing and the exhaustion of administrative remedies. *Lockhart* v. *United States*, No. 21,311, decided October 23, 1968. In that case the court excused the defendant's failure to take an administrative appeal on the ground that he did not understand his right to appeal. The court expressly found that petitioner had complied with the completion requirement by reporting for induction and refusing to step forward (slip op., pp. 2, 9–10). The government's petition for rehearing *en banc* from the part of the panel decision dealing with exhaustion was granted on November 13, 1968, and the case is still pending in the court of appeals.

[17] *Oestereich* v. *Selective Service Board*, No. 46, this Term, decided December 16, 1968, in no way limits the application of the doctrine of the completion of administrative processing in the instant case. In the limited class of situations recognized in that decision where a registrant may proceed by injunctive suit without awaiting the possibility of criminal prosecution, a registrant may legitimately not be required to await an order to report for induction before filing his suit. This is far different from saying that a registrant may do nothing, not even report for a physi-

In this connection it should be noted that no registrant is exempted by statute from complying with an order to report for a pre-induction physical examination. Indeed, the Selective Service System regulations expressly authorize a local board to order a pre-induction physical for an individual who is in a class other than Class I–A, Class I–A–O and Class I–O, if the local board determines that his induction may shortly occur (32 C.F.R. 1628.11(c)). Since a sole surviving son is not statutorily exempt in time of war or national emergency, he could properly be required to report for a physical under this regulation.[18] Petitioner could thus have been prosecuted for failing to report for his physical examination, a duty imposed upon him by the Selective Service Act and regulations (see 32 C.F.R. 1628.16) within the meaning of 50 U.S.C. App. 462, and his claim that he was entitled to a statutory exemption would in no event have constituted a defense. Accordingly, petitioner, who twice willfully refused to report for a pre-induction physical and who never reported to the induction center at all, should at all events be barred from asserting the defense of misclassification in this prosecution because of his failure to complete his administrative processing—however the exhaustion issue, as a general matter, is resolved.

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cal examination, and still claim misclassification as a defense when prosecuted (see note 6, *supra*).

[18] In this regard it should be noted that a sole surviving son can waive his exemption under the statute and volunteer for service in the Armed Forces. *Cf. Pickens* v. *Cox*, 282 F.2d 784 (C.A. 10).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

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APPENDIX

Statistical Report for the National Selective Service Appeal Board for the Six-month Period, January 1, 1968, through June 30, 1968

Total number of appeals received as of June 30, 1968	1,094
Total number of appeals adjudicated	1,129
In Adjudicated Cases:	
Appeals taken by the Director of Selective Service	361
Appeals taken by the State Directors	289
Appeals taken by Split Decisions	479

Disposition of Presidential appeals on which action was taken during the period January 1 through June 30, 1968:

Director:	
Reversed	135
Affirmed	219
No Action	7
Total	361
State Directors:	
Reversed	137
Affirmed	146
No Action	6
Total	289
Split:	
Reversed	147
Affirmed	330
No Action	2
Total	479
Total	1,129

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